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NTSB Order No. EA-3875

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of April, 1993

PAUL R. WESSEL, Applicant, v. JOSEPH M. DEL BALZO, Acting Administrator, Federal Aviation Administration, Respondent.	Docket No. 110-EAJA-SE-10693

OPINION AND ORDER

Applicant has appealed from the April 25, 1991 decision of Administrative Law Judge Jimmy N. Coffman denying his request for agent fees and expenses under the Equal Access to Justice Act, 5 U.S.C. 504 (EAJA).[1] Although the Administrator did not prevail on the merits of his complaint, the law judge concluded that the Administrator was substantially justified in bringing his

[1]The law judge's initial decision (ID) is attached.

actions. Accordingly, EAJA compensation was not authorized. We deny the appeal.

The Administrator's complaint charged that, immediately after takeoff from Honolulu International Airport on July 17, 1989, applicant made a steep right banking turn at an altitude of 200 feet or less. The maneuver was alleged to be careless, in violation of 14 C.F.R. 91.9.[2]

The Administrator introduced the continuous data recording (CDR) of applicant's departure flight path to demonstrate the aircraft's altitude at various points. The data showed that the Cessna 414 was at 200 feet while in a turn. Tr. at 42.

In addition to introducing testimony by the FAA incident investigator, the Administrator offered testimony from two eye witnesses: Mr. Martin, an FAA inspector; and Mr. Morrow, an air traffic controller. Mr. Martin, who was acting as a check airman for an individual doing an external preflight check at the time, testified to seeing a 414 lifting off and making an immediate steep banking turn approximately 200 yards away from his location. According to Mr. Martin, he then lost sight of the aircraft behind a hanger. Tr. at 50-51. He immediately called the tower and applicant's aircraft number was provided to him. Mr. Martin further testified that the aircraft's bank angle was 30-45°, where in similar circumstances in a flight test, an angle

[2]§ 91.9 (now 91.13(a)) provided:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

of 30° would be unsatisfactory. (This safety evidence was later expanded on with extensive testimony from the investigating inspector, Mr. Luehring.)

Mr. Morrow, who viewed the event from the tower approximately 1 mile away (Tr. at 130), testified next. He described the angle of bank as 20-30°, with the aircraft making a "good turnout" at 200-300 feet altitude. He stated that the Cessna went between no buildings, and that he saw nothing unsafe in the maneuver.

Applicant testified that he made a 20-30° banked turn at approximately 200 feet. He denied exceeding a bank angle of 30° and denied that the maneuver was dangerous or abnormal. Applicant offered testimony of his investigator, Mr. Konop, who used the CDR to argue that applicant's steepest bank was 25.9°. Tr. at 56. He contested the Administrator's evidence of safe banking angles and altitudes, arguing that a 30° bank need not be inherently dangerous. Mr. Konop considered a "steep" turn to be 35°.

The law judge dismissed the complaint. He found that applicant performed a 20-30° banking turn at altitudes ranging from 200-400 feet. Tr. at 125-126. In finding that the Administrator had not met his burden of proof, the law judge relied heavily on Mr. Morrow's testimony that the maneuver was not dangerous. See Tr. at 126 for law judge's findings and

discussion.[3]

The law judge, nevertheless, later disallowed applicant's EAJA claim, holding that the Administrator's complaint had a reasonable basis in fact and law.[4] The law judge specifically found that, if the Administrator gave the greatest credence to Mr. Martin, the Administrator could reasonably have concluded that it was appropriate to pursue the complaint. The law judge termed Mr. Martin the closest experienced observer, and found

[3]In fact, Mr. Morrow's testimony that applicant performed a "good turnout" did not establish that it was within acceptable safety limits, only that Mr. Morrow was impressed that the aircraft had the capability of such a quick turnout. Tr. at 124.

[4]See Catskill Airways, Inc., 4 NTSB 799 (1983). See also Application of US Jet, NTSB Order EA-3817, at 2 (citations omitted) (1993): "To find that the Administrator was substantially justified, we must find his position reasonable in fact and law, i.e., the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory." In analyzing substantial justification, the record as a whole, as opposed to the Administrator's action at one particular step of the proceeding, is relevant. Alphin v. National Transp. Safety Bd., 839 F.2d 817 (D.C. Cir. 1988).

nothing unreasonable in the Administrator placing great weight on his report of the incident. Therefore, the law judge concluded, the Administrator had a reasonable basis for believing the truth of the facts he alleged in the complaint. ID at 5-6. The law judge further found a reasonable basis in the law for alleging a § 91.9 violation, and held that the Administrator had reason to believe that the facts would establish his legal theory, i.e., that applicant's maneuver created a potentially unsafe situation. ID at 6-8.

On appeal, applicant challenges the law judge's findings in each of these areas.

1. Was the Administrator's position reasonable in law? Applicant reiterates his argument before the law judge that, because the turning maneuver was only potentially unsafe, and no malfunction occurred, no § 91.9 violation can stand. Applicant's thesis is directly at odds with the well-established theory of potential endangerment as a violation of § 91.9. See, e.g., Haines v. Department of Transp., 449 F.2d 1073, 1076 (D.C. Cir. 1971). Thus, we affirm the law judge's finding that the Administrator's position was reasonable in law.

2. Was the Administrator's position reasonable in fact and did the facts support the Administrator's legal theory? Applicant argues that the Administrator unreasonably relied on the testimony of Mr. Martin (excluding other witnesses and evidence), that the Administrator's factual case was weak, and that the Administrator failed to conduct a sufficient

investigation.

Consistent with Alphin, the first question we must address is whether the Administrator had sufficient reliable evidence initially to prosecute the matter. We agree with the law judge that it was not error for the Administrator to rely substantially on Mr. Martin's report. Mr. Martin had considerable expertise with this aircraft, and appeared to have good visibility and recollection of the event. And, as the law judge found, Mr. Martin was the closest observer; Mr. Morrow was much further (1 mile) away. Accord Smith v. Administrator, NTSB Order EA-3648 (1992).

Applicant's argument suggests that witness statements must be identical for the Administrator to be reasonable in relying on them. Applicant also ignores the role credibility determinations can play in proceedings such as these. Witnesses often have widely different versions of the same event, and aircraft altitudes and attitudes are not always easy to estimate. Mr. Martin's recollection was not so far off as to be unreliable in all respects.[5]

The law judge found that the testimony of all the witnesses (including applicant) was not so different as to undermine the Administrator's reliance on Mr. Martin. See Tr. 121-122 and Smith v. Administrator, NTSB Order EA-3648 (1992). The law

[5]Although we do not and need not rely on this point, we also note that Mr. Martin was a trained investigator, who could be presumed, absent evidence to the contrary, to be a reliable reporter of aviation events. See also the Administrator's Reply, at 18-19.

judge's analysis, with which we agree, disproves applicant's claim (Appeal at 13) that each of the other witnesses and all the evidence tended to refute Mr. Martin's testimony.[6]

Applicant would also have us penalize the Administrator for failing to question two other potential witnesses: a nurse in the aircraft and the individual to whom Mr. Martin was giving a flight check at the time. This approach, however, is more intrusive than necessary to enforce the lesson of Alphin. We believe the proper and reasonable course is to review the FAA's actions and determine if, anywhere along the way, it failed to take actions that would have been reasonable in the circumstances. Thus, in Application of Hampton, NTSB Order EA-3557 (1992), we found the Administrator not substantially justified in continuing with his prosecution after he was put on notice by applicant of certain facts that could reasonably be seen as critically undermining the Administrator's case, and he failed to respond to this information in any manner. The instant case also does not rise to the level of Catskill, where we found the evidence inadequate to pursue the complaint. Here, the Administrator interviewed a number of individuals, and we see no abuse in prosecuting applicant based on the information that developed.[7] That the law judge dismissed the complaint is not,

[6]We also agree with the Administrator that he was reasonable in proceeding under the assumption that the aircraft Mr. Martin saw was applicant's. Tr. at 91.

[7]We further note that Ms. Hansen left for Cambodia shortly after the incident. Her written statement (Exhibit R-17) offers no useful details.

given the facts here, evidence that the Administrator was not warranted in bringing it. As the law judge (Tr. at 181), we also fail to see how the Administrator violated his own investigation procedures or how he violated the Federal Aviation Act, as applicant alleges.

Applicant, of course, also has the opportunity to interview witnesses and bring conflicting information to the Administrator's attention, as in Hampton. Applicant's D-1 addendum to his appeal, even if it were to be accepted as new evidence, contains no substantive discussion.

Applicant declined to answer the investigator's letter (Exhibit R-11) and, at no point prior to the hearing, did applicant give the Administrator any information on which to reconsider his analysis, nor is there anything in the record to support a finding that the Administrator unreasonably interpreted the expected testimony of his witnesses or failed to pursue obvious or reasonable investigatory avenues that would have convinced him to withdraw the complaint.

As to applying the legal theory to the facts alleged, the law judge thoroughly discussed the extensive evidence offered by the Administrator to show the dangers inherent in low level, steep banking turns. ID at 7-9. Applicant offers no substantive reason to overturn that analysis. The facts alleged reasonably supported the legal theory. That the law judge found that the Administrator had not met his burden of proof did not necessarily mean that the Administrator was substantially justified in

pursuing the complaint.

In sum, the case before us does not rise to the level at which EAJA intends the government to compensate applicant. See Catskill (EAJA awards are intended to dissuade the government from pursuing "weak or tenuous" cases; the statute is intended to caution agencies carefully to evaluate their cases, not to prevent them from bringing those that have some risk). And, applicant offers no case law to support his theory that failure to follow the Federal Rules of Civil Procedure discovery directives justifies awarding EAJA fees, even if those rules were binding on this agency (which they are not, see 49 821.19(c)).

ACCORDINGLY, IT IS ORDERED THAT:

Applicant's appeal is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.